The certificate issued by the Registrar of Business clearly shows that the tenant Lee Meow Nyin was the sole proprietor of the business Cheong Fatt Merchant. Since the landlord Lee Meow Lim was not a co-proprietor or proved to have any share in that business, I fail to see how he could be presumed to have allowed the premises to be occupied by Cheong Fatt Merchant free of charge.

Under the circumstances, I find that the writ of distress had been correctly issued, and should not have been struck off.

Nabisco's application to intervene is based on the fact that it had obtained judgment against the respondent (tenant) on 25 January 1988 and had earlier obtained and executed an order for attachment before judgment against the respondent on 8 January 1988, ie three days after the writ of distress was obtained by the applicant (landlord). The purpose of the intervening action is to get the writ of distress set aside so as to disentitle the landlord/applicant from the proceeds of the auction sale of the property of the tenant/respondent. The question is whether Nabisco should be allowed to intervene in the action for writ of distress.

The application to intervene is made under O 8 r 6(2)(b) of the Rules of the Subordinate Courts 1980, which is similar to O 15 r 6(2)(b) of the Rules of the High Court 1980.

Order 8 r 6(2)(b) of the Rules of the Subordinate Courts 1980 states:

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application
> (b) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party.

In *Sanders Lead Co Inc* v *Entores Metal Brokers Ltd*,[3] the Court of Appeal held that a person had to have an interest directly related to the subject matter of an action before he was entitled to intervene in the action under RSC O 15 r 6(2)(b)(ii). A mere commercial interest in the outcome of the action, divorced from its subject matter, such as interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene.

Nabisco is clearly a creditor of 'one of the parties', ie the respondent in the distress action. He should not have been allowed to intervene in this action.

I therefore allowed the appeal with costs.

Appeal allowed.

Solicitors: *Chew Biman & Co*; *Syarikat Radhakrishnan.*

Reported by *Wong Kim Fatt*

Zublin Muhibbah Joint Venture v Government of Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R8-24-41-89
EUSOFF CHIN J
19 JUNE 1989

Arbitration — Foreign attorney — Whether an American attorney can assist in the arbitration proceedings if he is not an advocate and solicitor — Functions exercised by American attorney normally done by an advocate and solicitor — Functions performed in arbitral forum and not courts of justice — Legal Profession Act 1976, ss 36 & 37(1)

Legal Profession — Foreign attorney — Whether an American attorney can assist in arbitration proceedings if he is not an advocate and solicitor — Functions exercised by American attorney normally done by an advocate and solicitor — Functions performed in arbitral forum and not courts of justice — Legal Profession Act 1976, ss 36 & 37(1)

The plaintiff had entered into a contract with the defendant to construct for the defendant three berths at the Johore Port. Claims were made by the plaintiff and counterclaims by the defendant under the contract which went to arbitration. In the arbitration proceedings the plaintiff retained a firm of solicitors to represent them and an American attorney was required by the solicitors to assist in the cross-examination of the witnesses because of his wide experience involving the particular type of contract. Counsel for the defendant objected to the presence of the American attorney at the arbitration on the ground that he was not an advocate and solicitor under the Legal Profession Act 1976 and the arbitrator asked the parties to make an application to sort out the objection.

Held, granting the declarations sought by the plaintiff:

(1) An advocate and solicitor who is a qualified person under s 36(1) of the Legal Profession Act 1976 is given exclusive right by the law to appear and plead in all courts of justice in Malaysia. However, that section does not give exclusive right to him nor prohibit him from appearing in other tribunals which are not courts of justice in this country. An unauthorized person is prohibited under pain of penalty from performing any of the acts mentioned in s 37 of the Act. However, s 37 of the Act is specific in the sense that those acts to be performed must be done in the courts in Malaysia, or relating to any proceedings in any court in Malaysia.

(2) An arbitral forum is not a court of justice in Malaysia as envisaged by the Legal Profession Act 1976. It is a private tribunal. Any person who assists a party in presenting his case may also attend for the arbitrator which is either provided for by the arbitration agreement or under s 13 of the Arbitration Act 1952.

(3) Even if the American attorney might have taken actions or performed the duties which normally are done by an advocate and solicitor in this country, he had done so not in or relating to a court in Malaysia, but only in or relating to an arbitration proceeding. His actions therefore did not offend s 37 of the Legal Profession Act 1976.

(4) The law governing arbitration proceedings in Malaysia is the Arbitration Act 1952 and the Legal Profession Act 1976 has no application to arbitration proceedings in West Malaysia.

[*Editorial Note*: The defendant appealed to the Supreme Court vide Civil Appeal No 01-12-1989 but the appeal was dismissed on 2 January 1990 following a successful preliminary objection brought by the respondents that the matter had been settled and that there was no longer any live issue before the court.]

Case referred to
1 *Haigh* v *Haigh* (1861) 31 LJ Ch 420 (folld)

Legislation referred to
Arbitration Act 1952 ss 19, 20, 21, 22
Legal Profession Act 1976 ss 35(1), 36(1), 37(1), 40

W Davidson (*Rejendra Navaratnam* with him) for the plaintiff.
KN Segara (Senior Federal Counsel) for the defendant.

Cur Adv Vult

Eusoff Chin J: The plaintiff, Zublin Muhibbah Joint Venture consists of a company called Ed Zublin AG of Germany, and a local company called Muhibbah Engineering (M) Sdn Bhd. The plaintiff has entered into a contract with the Malaysian government (the defendant) on 24 September 1981 to construct for the defendant three berths at the Johore Port.

The plaintiff made claims and the government (defendant) made counterclaims under cl 67 of the contract, which went to an arbitrator. The plaintiff retained a firm of advocates and solicitors, Azman, Davidson and Co, to represent them in the proceedings before the arbitrator, Mr CH Teoh.

Mr Davidson who appeared for the plaintiff at the arbitration proceedings required one Mr Mahir Jalili, an American attorney who also holds a masters degree in chemical engineering, to assist him to cross-examine witnesses because Mr Jalili has had wide experience in international arbitration matters involving engineering contracts. Further, para 8 of Mr Davidson's affidavit states:

> Mr Mahir Jalili's role in these arbitration proceedings has up to the present stage been mainly concerned with preparation of witness statements, pleadings and documentary evidence. This has been both current and necessary since the principal witnesses of the claimants are resident in either London or West Germany and Mr Mahir Jalili is in a better position than I am to work in conjunction with the headquarters of Ed Zublin AG which is situated at West Germany. Ed Zublin AG, through their local subsidiary Zublin (M) Sdn Bhd were the managers of the joint venture. So in consequence the instructions came principally from them rather than from Muhibbah Engineering (M) Sdn Bhd, their Malaysian joint-venture partners.

Learned senior federal counsel, Mr KN Segara, objected to Mr Jalili's presence to assist Mr Davidson on the ground that Mr Jalili is not an advocate and solicitor under the Legal Profession Act 1976. The arbitrator being a non-legal man had asked the parties to sort out this objection. Hence this application to the High Court.

Mr Davidson's firm had written to, and received a reply from the Bar Council of Malaysia to the effect that the Bar Council was of the view that the Legal Profession Act 1976 does not apply to foreign counsel in an arbitration proceeding in Malaysia.

Having heard submissions from both parties, and Dato' Peter Mooney from the Bar Council, I gave a decision on 20 April 1989 that a person representing a party in an arbitration proceeding need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and that the said Act has no application to an arbitration proceeding in West Malaysia.

The declarations sought by the plaintiff before me are:

(a) Foreign lawyers who are not advocates and solicitors within the meaning of the Legal Profession Act 1976 are not prohibited by the said Act from representing parties to arbitration proceedings in West Malaysia.
(b) The said Act has no application to arbitration proceedings in West Malaysia.

The main objection by learned senior federal counsel is that Mr Jalili has not been admitted as an advocate and solicitor of the High Court Malaya and since he is an unauthorized person within the meaning of s 36(1) of the Legal Profession Act 1976, he is precluded to act for any part under s 37 of that Act, and that even if he had acted, he is precluded from recovering any costs by the provision of s 40 of the Act. As regards the question of cost in arbitration proceedings, it is to be governed by the provision of ss 19 to 21 of the Arbitration Act 1952.

For the purpose of this judgment, it is necessary to quote here the relevant provisions of ss 35(1), 36(1), 37(1) and 40 of the Legal Profession Act 1976.

> 35 Right of Advocate and Solicitor
>
> (1) Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation.
>
> 36 Advocate and solicitor to have name on the Roll before practice
>
> (1) Subject to this section, no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorizing him to do the act; a person who is not so qualified is in this Act referred to as an 'unauthorized person'.
>
> 37 No unauthorized person to act as advocate and solicitor
>
> (1) Any unauthorized person who —
>
> (a) acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity, other than as a party to an action in which he is himself a party,

sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts; or

(b) wilfully or falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified or authorized to act as an advocate and solicitor, or that he is recognized by law so qualified or authorized,

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both.

40 No cost payable to unauthorized person

(1) No costs in respect of anything done by an unauthorized person as an advocate and solicitor or in respect of any act which is an offence under section 37 or 39 shall be recoverable by any person in any action, suit or matter.

(2) Any payment to an unauthorized person for anything done which is an offence under section 37 or 39 may be recovered in a Court of competent jurisdiction by the person who has paid the money.

An advocate and solicitor who is a qualified person under s 36(1) is given exclusive right by the law to appear and plead in all courts of justice in Malaysia. This s 36(1) does not give exclusive right to him, nor prohibit him from appearing in other tribunals which are not courts of justice in this country. An unauthorized person is prohibited under pain of penalty from performing any of the acts mentioned in s 37 of the Act. However, s 37 of the Act is specific in the sense that those acts to be performed must be done in the courts in Malaysia, or relating to any proceedings in any court in Malaysia.

An arbitral forum is not a court of justice in Malaysia as envisaged by the Legal Profession Act 1976. It is a private tribunal. Subject to s 12 of the Arbitration Act 1952, the arbitrator is appointed by the parties to an arbitration agreement to adjudicate on certain specific facts before him, and ultimately to settle the disputes between the contracting parties arising out of their contract. The parties who may appear before the arbitrator are those provided for by the arbitration agreement, or if the agreement does not so provide, then the provisions of s 13 of the Arbitration Act 1952 shall apply. Any person who assists a party in presenting his case may also attend, eg a shorthand writer, an assessor, an engineer, an architect, and such parties should not be excluded without good ground when their presence are desired by a party or the award of the arbitrator may be set aside. Thus in *Haigh* v *Haigh*,[1] where one of the parties desired to have his son present because the son was versed in the accounts of the business, and the arbitrator excluded the son and also a shorthand writer, the award was set aside.

In the case before me, the claimant's (plaintiff) learned counsel, Mr Davidson, desires the presence of Mr Jalili whose engineering qualifications and experience would place him in a more advantageous position to assist Mr Davidson to conduct the cross-examination of technical witnesses because there are many engineering issues which arise from the pleadings. Following *Haigh* v *Haigh*,[1] Mr Jalili who is an American attorney and chemical engineer, ought not to be excluded from appearing in the arbitration proceedings. Even if Mr Jalili might have taken actions or performed the duties which normally are done by an advocate and solicitor in this country, he had done so not in or relating to a court in Malaysia, but only in or relating to an arbitration proceeding. His actions therefore did not offend s 37 of the Legal Profession Act 1976.

I also find that the law governing arbitration proceedings in Malaysia is the Arbitration Act 1952 (Rev 1972) which came into force in Sarawak on 17 June 1952, and in other states on 1 November 1972, and that the Legal Profession Act 1976 has no application to arbitration proceedings in West Malaysia.

Learned senior federal counsel in the course of his submission also challenged this application as being improperly brought to this court. He submitted that the arbitrator should have taken action under s 22 of the Arbitration Act 1952, which states:

(1) An arbitrator or umpire may, and shall if so directed by the High Court, state —

(a) any question of law arising in the course of the reference; or

(b) an award or any part of an award, in the form of a special case for the decision of the High Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the High Court under this section shall be deemed to be a judgment of the High Court within the meaning of section 67 of the Courts of Judicature Act, 1964 (which relates to the jurisdiction of the Federal Court to hear and determine appeals from any judgment of the High Court), but no appeal shall lie from the decision of the High Court on any case stated under subsection (1)(a) without the leave of the High Court or of the Federal Court.

It is to be borne in mind that the arbitrator here is a non-legally qualified person. There is nothing to stop the claimant or the respondent in the arbitration proceedings to apply to the High Court for an order directing the arbitrator to state a special case for the decision of the court. The respondent in the arbitration proceedings should initiate that application since the respondent is the one objecting to Mr Jalili's assisting the claimant's

solicitors in that arbitration proceedings. Further, for the arbitrator to state a case under s 22 of the Act, he may need the services of a solicitor to assist him to do so. I, therefore, am of the view that I should not direct the arbitrator to state a case to the High Court but to proceed with this application before me and give a decision notwithstanding that my decision may be appealed against to the Supreme Court without leave required, as would have been the case if this matter had come to me under s 22(3) of the Act.

Order accordingly.

Solicitors: *Azman, Davidson & Co.*

Reported by *Yap Shao Sin*